

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NEW ENGLAND CARPENTERS HEALTH
BENEFITS FUND, PIRELLI ARMSTRONG
RETIREE MEDICAL BENEFITS TRUST,
TEAMSTERS HEALTH & WELFARE FUND
OF PHILADELPHIA AND VICINITY, and
PHILADELPHIA FEDERATION OF
TEACHERS HEALTH AND WELFARE FUND,

Plaintiffs,

v.

FIRST DATABANK, INC., a Missouri
Corporation; and McKESSON CORPORATION,
a Delaware Corporation,

Defendants

Case No. 1:05-CV-11148-PBS

Honorable Patti B. Saris

**DECLARATION OF SUSAN A. HAYES IN SUPPORT OF PLAINTIFFS'
MOTION FOR CLASS CERTIFICATION**

I, Susan A. Hayes, declare under penalty of perjury under the laws of the United States of America that:

Background

1. I am an owner of Pharmacy Outcome Specialists, LLC ("POS"), a firm in the pharmacy benefits industry specializing in auditing contracts between health benefit providers (*i.e.*, governments, unions, large and small employer groups, Blue Cross organizations, and insurers) and pharmacy benefit managers ("PBMs").

In conjunction with my partner, I formed POS in 1996 and own 50% of its outstanding shares. Since its formation, POS has enjoyed a national reputation as an independent auditor and consultant in the pharmacy benefits industry. Based on our skill and reputation, POS has been

retained by and advised several major health benefit providers concerning the design and administration of pharmacy benefits programs. Our clients include: SBC Corporation, McDonald's Corporation, Intel Corporation, Northwest Airlines Corp., United States Department of Defense, United States Department of Justice, State of Illinois, CNA Financial Corporation, Blue Cross Blue Shield of Florida and Health Care Services Corporation (a holding company for the Blue Cross licensees of Texas, New Mexico and Illinois), Hartford Financial Services and Ironworkers of New Jersey.

At POS I, along with others in the firm, have performed approximately 450 pharmacy benefit audits, approximately 30-40 of which focused on rebate issues. All of these projects involved a thorough understanding of industry terms including Average Wholesale Pricing (AWP), Wholesale Acquisition Cost (WAC), MAC (Maximum Allowable Cost), AAWP (Average Average Wholesale Price), Baseline Price (BLP) and Average Sales Price (ASP).

These audits have involved extensive review of claims data – data collected and retained by PBMs (pharmacy benefit managers) on behalf of their clients. This claims data contains, on a per claim level, over 150 fields of information on every transaction including such important fields as AWP pricing, ingredient costs, NDC (National Drug Code), dispensing fees, patient identifiers, copayment amounts, unit AWP, MAC or generic pricing and pharmacy and physician identifiers. As a regular procedure in our audits, our firm “reprices” claims to ensure adherence to the financial terms and matches the PBM reported AWP and WAC information to industry pricing sources, such as Medispan and First Data Bank pricing guides. As such, Pharmacy Outcomes Specialists has repriced an estimated 450 million claim transactions. I have managed or am familiar with our findings for virtually every project completed by my firm.

I regularly give speeches and industry presentations concerning pharmacy benefit management services. My curriculum vitae containing my relevant experience and education is attached as Exhibit "A" to this Declaration.

I have testified in depositions and at hearings and trial concerning my expert knowledge and opinions about, among other things: (a) the terminology used in PBM contracts and relationships between and among PBMs in general and in particular, their clients and pharmaceutical manufacturers; (b) the specific financial terms used in PBM contracts, such as discounts off AWP, dispensing fees, adherence to rebate terms (such as discounts off WAC pricing, prompt payment discounts and other payment concessions) and whether or not PBMs and/or drug manufacturers have met those terms; (c) the practices and procedures of PBMs concerning its payment to clients of certain rebates received from pharmaceutical manufacturers, and retention of other rebates and fees received from manufacturers; and (d) other conduct by PBMs that affected its clients. I was accepted as an expert in connection with the relations between PBMs and their clients by the Hamilton County Court of Common Pleas in Ohio and have been retained by the United States Department of Justice (the "DOJ") for expert advice and testimony concerning alleged improprieties by PBMs concerning services for the Federal Employees Plan. The attached curriculum vitae contains a list of all cases I and/or Pharmacy Outcomes Specialists have been involved with in providing expert witness opinions and reports.

Members Of The Proposed Class Use AWP As A Reimbursement Benchmark

2. In virtually every client assignment that Pharmacy Outcomes Specialists has undertaken, the client has produced a contract between itself and its PBM.

In addition to the 450 audits Pharmacy Outcomes Specialists has completed, we have also undertaken numerous other projects. As such, Pharmacy Outcomes Specialists has had the chance to review an estimated 500 to 700 PBM/client contracts over the last ten years. I would estimate that at least 95% of those contracts were based on a discount off Average Wholesale Price (AWP) as a pricing reference for brand drugs. This statement holds true for both claims purchased by members in a retail pharmacy, mail order pharmacy or under a specialty drug program. For generic drugs, prescription claims are either priced off a MAC list (Maximum Allowable Costs – a price derived by the PBM) or for those generics that the PBM determines does not have a MAC price, the generic prescription is priced using the same discount off AWP as brand drugs or a discount off AWP that is slightly better than the brand discount. MAC pricing is developed by the PBM using a combination of the unit WAC price and the unit AWP price and determining a “reasonable” compromise between the two prices on a drug by drug basis. So, it is safe to say that all drugs, whether brand or generic, are priced either directly using discounts off AWP (in the case of brand drugs) or as a basis for determining MAC costs for generics, which are in turn derived from a “compromise” of the WAC and AWP unit cost.

There are a very small amount of clients that may have a capitated arrangement with its PBM. In these very limited cases, less than 1% of Pharmacy Outcomes Specialists’ clients and of the industry as a whole, the PBM actually takes the risk for the claims and the client pays a premium to the PBM for taking the risk. However, even in these situations, the “price” or premium established between the PBM and the client is based off of actual experience of the client. The experience is based off of the actual claims transactions which again are based on pricing the claims using some level of discount off AWP. Therefore, even in these capitated

arrangements, whereby the client is not aware of the pricing terms, the actual experience is based on some discount off AWP.

In the remaining few percent of client contracts, pricing terms have not been disclosed.

3. Because of the massive numbers of claims transactions on a daily, weekly or monthly basis, only electronic databases can be used to price pharmacy claims. These databases interface with complex system programming of a PBM and within seconds assign a price to a claim that is then transmitted back to the pharmacy. Also within seconds, the PBMs system retains “two books” – one book that records the reimbursement price to the pharmacy and one book that records the price that is charged to the client based on the specific financial terms agreed to by the PBM and the client. On a bi-weekly (every two week) basis, claims data is collected, sent to the client so that these clients can fund the reimbursement checks to the pharmacy chains. The higher payment amounts received by a PBM are then reduced to the lower reimbursement amounts sent to the pharmacy chains and the difference is retained by the PBM. **Both the reimbursement rate and the amount charged to the client are based on a discounts off AWP unit pricing (i.e., AWP less a percentage).**

Today, as in the Class Period of January 2002 through March 2005, there are only two electronic pricing guides for AWP information in the industry: Medispan and First DataBank. These two companies were, at one time, owned by the same company. However, in 2001, the Federal Trade Commission (FTC) broke these companies apart stating that there was an alleged monopoly on drug pricing and fearing if only one of these companies were in existence, drug pricing could be tyrannically determined.

However, the result of this divestiture was to leave the industry with potentially “two” AWP unit costs for a single NDC (National Drug Code which indicates the manufacturer, drug,

strength and package size of over 65,000 drugs manufactured in the United States). PBMs were left to choose which pricing guide to base AWP on since their clients are typically not aware of the differences between Medispan and First DataBank.

So, one would conclude that the pricing guide that has the greatest spread between AWP and WAC would be the most popular to PBMs. In a recent study conducted by Pharmacy Outcomes Specialists, the following PBM's used First DataBank:

Medco

Express Scripts

Caremark/APCS

MedImpact

Argus

PerformRx

HealthTrans

Walgreens Health Initiatives

These above PBMs represent over 95% of the market, with the top three dominating the market place. Medco, Caremark and Express Scripts represent over 200 million Americans combined.

4. Pharmacy Outcomes Specialists has purchased First DataBank pricing every year it has been operating. Costs for the daily subscription to First DataBank information can be as costly as \$50,000 per year. Pharmacy Outcomes Specialists pays \$20,000 per year for this information since we only need the information on a monthly basis. Pharmacy Outcomes Specialists charges clients approximately \$15,000 to audit an entire year's worth of claims data. Therefore, it is not cost effective for a client to subscribe to First DataBank since an audit costs

less than the actual subscription. In addition to the cost of subscribing to First DataBank, the client would also need specialized computer and analytical skills in order to perform the audit. Therefore, it is not cost effective for clients to a) subscribe to First DataBank or b) audit AWP pricing. As a result, virtually no plan sponsor in the United States performs its own audit of AWP information. First DataBank's customers are principally wholesalers, PBMs, pharmacies and drug companies and to a lesser extent, consulting and auditing firms.

In conclusion, PBM clients would not be aware of the differences in AWP unit costs because most plan sponsors cannot cost justify a subscription to First DataBank, even the largest plan sponsors, such as Pharmacy Outcomes Specialists' clients, like Blue Cross of Illinois, Texas and New Mexico, Department of Defense and Wal-Mart. The pricing guide with the largest WAC to AWP spread would be most advantageous for PBMs. The pricing guide with the most PBM customers is First DataBank.

The FDB Pricing Archive That POS Maintains Can Be Used To Identify The Precise Increase In AWP Markup For Each Subject Drug

5. Because of our extensive work with claims data and auditing the pricing of prescription drugs, and our retention of First DataBank's pricing library for over ten years, Pharmacy Outcomes Specialists is uniquely able to a) identify when a pricing change was made to the brand drugs listed in the Class Action Complaint, Exhibit A; b) the amount of the change in terms of percentage of WAC or AWP unit costs and the amount in terms of unit cost increases (i.e. the dollar amount of the price increase attributable to the percentage markup). This information will enable the Class to prove both which drugs originated from traditionally 20% mark-up companies, which absent manipulation by defendants or extraordinary market event, would have been expected to remain 20% markup drugs for the duration of their availability on

the market as well as the impact of such market manipulation depicting for class members. Pharmacy Outcomes Specialists at the appropriate stage can provide information as to the a) timing of these changes; b) the percentage amount of these pricing changes and c) the dollar value on a per unit (per pill, tablets, milliliter) basis of the amount of the change. This level of reporting will eliminate any ambiguity for each drug as to the date of the change in the markup and the amount of the price increase attributable solely to the change in the WAC to AWP markup.

Defendants' Conduct, If True, Has A Class-Wide Impact And Can Be Easily Determined for the Class

6. Assuming Plaintiffs' allegations are true, Pharmacy Outcomes Specialists can analyze the financial impact to one or all of the Plaintiffs involved in this litigation, determine that impact on a per member basis and extrapolate that number over the Class. It is true that given a sufficient number of members, pharmaceutical use does not differ greatly over populations. It is for this reason that the industry has long regarded the IMS market share reports, which report use of a product within a therapeutic category, as the standard. IMS data takes thousands, but not millions, of claims transactions to calculate the market shares of each drug vis-à-vis its competition. Pharmacy Outcomes Specialist will also use thousands of claims transactions to determine the financial impact of the Scheme discussed in the Class Action Complaint.

Pharmacy Outcomes Specialists will match the pricing changes discussed above with actual claims data for class members to determine the cost impact to a population on a per member basis. Each record layout contains a payment indicator specifying whether the reimbursement was based on AWP and the discount associated with the final pricing of the

claim. Also included in the data is the quantity dispensed and the number of prescriptions dispensed for a single NDC.

To calculate the impact of the Scheme, Pharmacy Outcomes Specialists will use simple mathematical formulae. For example, if AWP unit price for Drug A was \$1.20 per pill before January 2002 and then on March 15, 2002, was changed to \$2.50 per pill, Pharmacy Outcomes Specialists will determine the frequency of dispensing of Drug A within each class member's claims data and multiply the unit cost increase by the frequency of the quantity dispensed within a population. Pharmacy Outcomes Specialists will then aggregate the cost for all of the drugs in Exhibit A, by performing a sum of the price impact of each drug and then spreading the cost over the population. Specifically, Pharmacy Outcomes Specialists will use the following example/ formula:

Drug Name	Unit AWP before pricing change	Unit WAC price before pricing change	Unit AWP after pricing change	Unit WAC after pricing change	Percentage markup between WAC and AWP before price change	Percentage markup between WAC and AWP after price change	Cost increase due solely to percentage markup increase	Dollar Value of Price Increase minus discount of 15%
Drug A	\$1.20	\$1.	\$2.50	\$2.	20%	25%	\$.10	\$.085

(Dollar Value of Price Increase) times (the quantity dispensed for the population over the relevant period, in the example three years) plus the same calculation for every drug on Exhibit A

For example the total from adding all of the price increases times quantity might equal \$100,000 for a population of 500 lives or \$200 per member to determine the per member impact.

Then to determine the impact to the Class, Pharmacy Outcomes Specialists would multiply the per member impact times the total population.

In conclusion, Pharmacy Outcomes Specialists will determine the monetary value of the ubiquitous pricing change within a population and of the class as a whole within a relatively short time frame using simple mathematics.

A Particular Class Member's AWP-Based Payments and Damages Can Be Identified From Their Claims Databases

7. In conclusion the damages in this case can be quickly and easily estimated using simple mathematics, the Plaintiffs' claims data and Pharmacy Outcomes Specialists' library of First DataBank price information.

Dated: July 13, 2006.

Susan Attayas

Principal,
Pharmacy Outcomes Specialists
41 E. Main Street, Suite 200
Lake Zurich, IL 60047
Work 847 540 9590 ext. 102

Curriculum Vitae

Susan A. Hayes

Profile

Susan A. Hayes (nee Peard) has a 25-year career in employee benefits, with the last 19 years specializing in the pharmacy benefits industry. She is an expert in the pharmacy market place and has an in-depth understanding of how Pharmacy Benefit Managers price and market their products, as well as the overall workflow and management of these organizations. She has consulted to large Fortune 500 employers, managed care organizations and state and federal government agencies. She is a licensed pharmacy technician by the State of Illinois. She is a frequent author and speaker on the topic of auditing Pharmacy Benefit Managers and instructing plan sponsors on how to best manage the growing cost of pharmacy benefit programs.

Work experience

1996 - Present **Pharmacy Outcomes Specialists** Lake Zurich, IL
Principal/Owner

Partner in pharmacy benefits consulting firm specializing in finance, clinical management and contract compliance/audits. Clients include McDonalds, SBC Corporation, Department of Defense, Office of Personnel Management/ Federal Civilian Employees, Wal Mart Corporation and Priority Health.

1994 - 1996 **Systemed Pharmacy, Inc.** Itasca, IL
Vice President, Sales and Marketing

Formed marketing function within two recently merged companies, built and developed staff of 12, positioned Company within marketplace with a brand identity and responsible for sales support, member and sales communications, research, graphics design and production unit, video studio and product development functions for a \$180 million, publicly traded, independent prescription drug benefit management company.

1991 - 1994 **Walgreen Co./Healthcare Plus** Deerfield, IL
Vice President, Marketing

Strategically designed marketplace and product mix for Healthcare Plus division, growing mail service revenues from \$12 million to \$120 million in two years. Responsible for client/member communication, sales support, pricing and strategic partnership development; and related budget and staff of 7.

1986 - 1991 **William M. Mercer, Inc.** Chicago, IL
Associate

Developed and managed a team of national consultants specializing in prescription drug auditing and bid procurements amounting to over \$1 million in annual revenue. Clients included Arthur Andersen & Co., Exxon, USA, Ameritech, Sara Lee Corporation, the Marmon Group and Uniroyal.

Responsible for revenue generation and project management. Also designed and underwrote pricing for flexible benefit plans.

1984 - 1986 **Towers Perrin** Chicago, IL

Consultant

Co-chaired effort to initiate health claim audit practice for Towers Perrin growing practice to over 50 clients in two year span. Responsible for technical consulting, product development and revenue generation.

1982 - 1984 **Hewitt Associates** Lincolnshire, IL

Consultant

Audited health claims for Fortune 500 clients, including first audit of Aetna's AECCLAIMS systems. Responsible for technical audit and report to clients.

1980 - 1982 **Wickes Corporation** Lincolnwood, IL

Benefit Manager

Managed all employee benefit programs, including Defined Benefit, 401(k), Medical, Dental, Disability and Life Insurance programs, including all financial and funding arrangements and government filings for 5,000 Leath/Maxwell employees in over 25 states. Managed staff of five including self-administered, self-funded claims processing unit.

Education

1976 - 1979 **Northeastern Illinois University** Chicago, IL

Bachelor's Degree, Criminal Justice

**Professional
Memberships**

Member of:

- Academy of Managed Care Pharmacy
- Working Professionals in Employee Benefits
- National Council on Prescription Drug Programs

Quotes in Articles

Wall Street Journal, February 15, 2005 – "Generic Drugs By Mail Can Be A Raw Deal"

Employee Benefit Plan Review, February 2003 – "Plan Sponsors Guide to Managing Life Enhancing, Lifestyle and Cosmetic Drugs"

Wall Street Journal, August 14, 2002 – "Firms Paid to Trim Costs Also Toil For Drug Makers"

Managed Care, April 2002 – "HMOs Should Prepare How to Handle Injectables"

Employee Benefit News, February 2001 – "Pills on Parade"

Employee Benefit News, July 2000 – "To Control Rx Costs, Enforce Your Rights"

Employee Benefit News, February 2000 – “Under the Microscope”

Employee Benefit News, September 1997 – “Influencing Care”

Employee Benefit News, April 1995 – “Speaking Out”

Employee Benefit News, February 1995 – “Worksite Wellness”

Authored Articles

Employee Benefit Plan Review, September 2002 – “Pharmacy Case Management: Applying Lessons Learned from Medical Utilization Review”
Authored with Rami Rihani and Shannon Spears

PBM News, Summer 2001 – “Rebate Contracting 101” Authored with Wendy Smith, Touchpoint Health Plan

Employee Benefit News, January 1999 – “Auditing Prescription Drug Benefit Programs”

Employee Benefits News – March 1998 – “Managing Prescription Drug Programs”

Compensation and Benefits Management, Spring 1992, “Managed Prescription Programs: Integrating Retail and Mail Order Services”

Employee Benefit News, July 1990 – “Mail Order Programs: Where are We Now?”

Books

Health Insurance Answer Book, 2002 Supplement, A Panel Publication, Chapter 16, Pharmacy Benefit Management

Speeches and Industry Presentations

Working Professionals in Employee Benefits, March 2005, “The Role of a Broker and Consultant in Pharmacy Plans”

International Foundation of Employee Benefit Plans, November 2004, “Prescription Drugs: Opening Session” and “Plan Design Beyond Formularies”

Department of Defense Contract Auditors, November 2003, “Audits and Overview of Pharmacy Benefits Industry”

International Foundation of Employee Benefit Plans, November 2003, “How Are Funds Better Managing Pharmacy Costs?”

International Foundation of Employee Benefit Plans, September 2003, “Managing Prescription Drug Costs”

Working Professionals In Employee Benefits, August 2003, “Case Management: The Next Frontier in Disease Management”

International Foundation of Employee Benefit Plans, April 2003, “Increasing Drug Costs for the Sheet Metal Industry”

Fraud Prevention Institute, July 2003, "Pharmacy Fraud: How to Spot It and What to Do About It"

AFL-CIO Health Care Seminar, June 2003, "Between a Rock and a Hard Place: The Health Care Squeeze on America's Workers, Strategies for Bargaining and Policy Reform"

National Educational Association, November 2002, "Increasing Drug Costs, The Role of PBM's and Audits"

Health Action Council of Northeast Ohio, March 2002, "Full Disclosure of PBM Revenue Sources"

Dutchess Educational Health Insurance Consortium, February 2002, "Rebates, Formularies and Prescription Drug Programs"

International Foundation of Employee Benefit Plans, February 2002, "Administering Drug Programs"

International Foundation of Employee Benefit Plans, February 2002, "Managing Prescription Drugs"

Department of Defense Briefing, November 2001, "Department of Defense (DoD) Pharmacy Programs for Beneficiaries Age 65+, Background, Current Programs and Future"

American Federation of Teachers/National Education Association, October 2001, "How to Control Rising Prescription Drug Costs: A Case Study"

Corporate Benefits Conference, October 2001, "Steps to Managing Prescription Drugs"

Data Niche Symposium, September 2001, "Rebate Contracting: What They Aren't Telling Them"

Cost Containment Strategies for Pharmaceutical Benefits, September 2001, "Rebate Contracting for Benefit Managers"

International Foundation of Employee Benefit Plans, August 2001, "Benefits Communication Technology"

Benefits Conference for Public Employees, July 2001, "Prescription Drug Management"

Pharmacy Benefits Management Institute, April 2001, "Rebate Contract Management 101"

American Federation of Teachers/National Education Association, March 2001, "How to Control Rising Prescription Drug Costs: A Case Study"

American Federation of Teachers, March 2001, "Rising Drug Costs and the Effect on Chicago Public Schools"

Working Professionals in Employee Benefit Plans, March 2001, "Pharmacy Rebates 101"

Institute for International Research, February 2001, "How to Cap Rising Drug Costs"

Benefits Management Forum and Expo, September 2000, "How to Cap Rising Drug Costs"

Certified Employee Benefits Specialists Symposium, September 2000, "Real Solutions for Growing Drug Costs"

Working Professionals in Employee Benefit Plans, July 2000, "Understanding and Managing Drug Costs"

HMO Pharmacy Symposium Northeast, May 2000, "Fraud and Abuse: Keeping Up With the Latest Tricks"

Pharmacy Benefit Management Institute, April 2000, "Overview of Utilization Management"

Wisconsin Educators Association, April 2000, "Innovative Pharmacy Plan Designs"

BCBS Association Symposium, October 1999, "Auditing Prescription Drug Plans"

Working Professionals in Employee Benefit Plans, October 1999, "Managing Lifestyle and Life Enhancing Drugs"

Certified Employee Benefits Specialists Symposium, October 1999, "Prescription Drug Costs: The Hottest 1999 Topic"

International Foundation of Employee Benefits, Conference for Public Employees, June 1999, "Maximizing Quality in Prescription Drug Programs"

Certified Employee Benefits Specialists, June 1999, Managing Lifestyle and Life Enhancing Drugs"

Pharmacy Benefits Management Institute, April 1999, "Managing Lifestyle and Life Enhancing Drugs"

Chicago Business Group on Health, March 1999, "Pharmacy Trends: What Employers Can Do About Rising Costs"

National Managed Health Care Coalition, March 1999, "Missing Link: Pharmacy and Medical Data Management"

The Employer Conference, October 1998, "Prescription Drug Dilemma"

Expert Reports and/or Analysis:

Expert Experience

Horizon Blue CrossBlue Shield of New Jersey v. Medco

Fidelity v. Express Scripts, Inc.

New England Health Care Local 1199 v. Express Scripts, Inc.

HealthFirst, Inc. v. Medco

Group Hospitalization and Med. Services d/b/a Carefirst Blue Cross Blue Shield v. Merck-Medco Managed Care

Express Scripts, Inc. v. UFCW Local 1776

State of Illinois (no complaint filed)

Office of Personnel Management (no complaint filed)

State Teachers Retirement System of Ohio v. Medco

United States, et al v. Medco Health Solutions

Depositions:

Diversified Pharmaceutical Services v. Medica Health Plans

Express Scripts, Inc. v. UFCW Local 1776

United States, et al v. Medco Health Solutions

State Teachers Retirement System of Ohio v. Medco

Arbitrations:

Express Scripts, Inc. v. UFCW Local 1776

Jury Trials and Results:

State Teachers Retirement System of Ohio v. Medco (Plaintiff awarded \$7.9 million for breach of fiduciary duty and constructive fraud)

**Professional
Designations**

Licensed Pharmacy Technician, State of Illinois, 1997 to Present, License Number 049-123224

Personal

Vice President and Secretary, McHenry County Jewish Congregation, 2001 to 2003

Northeastern Illinois University, Board of Alumni Advisors, 1996 to Present